EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-37-08

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75, LOCAL 3742,	)	
Complainant,	)	
v.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
UMATILLA COUNTY,	)	
Respondent.	)	

On April 2, 2010, this Board heard oral argument on Complainant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on November 20, 2009, after a hearing held on June 22, 2009, in Salem, Oregon. The record closed on August 3, 2009, following receipt of the parties' post-hearing briefs.

Allison Hassler, Legal Counsel, Oregon AFSCME Council 75, Eugene, Oregon, represented Complainant.

David M. Thompson, Attorney at Law, Bullard Smith Jernstedt Wilson, Portland, Oregon, represented Respondent.

On October 10, 2008, Oregon AFSCME Council 75, Local 3742 (Union) filed an unfair labor practice complaint against Umatilla County (County), alleging that the County failed to bargain in good faith in violation of ORS 243.672(1)(e) during negotiations pursuant to a health insurance reopener provision in the parties' collective bargaining agreement. The County filed a timely answer to the complaint.

The issue is:

Did the County violate ORS 243.672(1)(e) by failing to bargain in good faith regarding a health insurance reopener provision in the collective bargaining agreement?

Each party asks us to impose a civil penalty on the other.

RULINGS

1. The Union objected to Exhibits R-13-A, R-13-B, R-13-C, and R-13-D, which are partial transcripts of three bargaining sessions. The ALJ reserved ruling on the admission of these exhibits and the parties later agreed to produce complete transcripts of these meetings. After the hearing, the Union submitted complete transcripts of the three bargaining sessions and the County notified the ALJ that it had no objection to the receipt of the transcripts. Therefore, the complete transcripts of three bargaining sessions, marked as Exhibit C-33, are received into the record. Exhibits R-13-A, R-13-B, R-13-C, and R-13-D are not received.

2. The Union also objected to the relevance of Exhibits R-39, R-39-A, R-39-B, R-39-C, R-39-D, and R-40, which are the County's 2007-10 collective bargaining agreement with the Umatilla County Law Enforcement Association (UCLEA Contract), the proposals exchanged during the bargaining for that contract, and the comparability spreadsheets that were used during that bargaining. The County offered these exhibits as relevant to health insurance reopener negotiations since the Union's reopener proposal was based on the UCLEA Contract, and the County and Union discussed the UCLEA Contract health insurance provisions during reopener bargaining. The ALJ reserved ruling on these exhibits. We find that the parties discussed Exhibit R-39, the UCLEA Contract, and Exhibit R-40, data comparing Umatilla County sheriff deputies' salaries with sheriff deputies' salaries in other counties. These exhibits are relevant and are received into evidence. Exhibits R-39-A, R-39-B, R-39-C, and R-39-D, the bargaining proposals exchanged during UCLEA contract negotiations, are not relevant and are not received into evidence.

3. The Union also objected to the introduction of Exhibits R-41, R-41-A, and R-41-B, which are related to materials from negotiations between the AFSCME Council 75 (AFSCME) deputy district attorneys' bargaining unit and the County. These exhibits reflect the County's negotiations with the district attorneys' bargaining unit; much of this bargaining occurred during the period when the County was negotiating with the Union under the terms of the health insurance reopener in the parties' contract. Accordingly, Exhibits R-41, R-41-A, and R-41-B are relevant to show the County's approach to bargaining during the relevant time period and are received into evidence.

4. Pursuant to ORS 183.450(4), we take official notice of this Board's case files in *Umatilla County Law Enforcement Association v. Umatilla County*, Case No. RC-009-06, and *American Federation of State, County and Municipal Employees, Council 75 v. Umatilla County District Attorney and Umatilla County*, Case No. CC-002-08.

5. The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Union is the exclusive representative of a bargaining unit of courthouse employees who work for the County, a public employer.

Background

2. The County and Union were parties to a collective bargaining agreement effective July 1, 2004 through June 30, 2007. Article 17 of the parties' agreement required the County to contribute a specified dollar amount, referred to as an "insurance cap," toward the cost of insurance for bargaining unit employees. Employees paid the difference between the total cost of the insurance and the County's contribution. The "insurance cap" arrangement had been included in a number of the parties' prior agreements.

3. The County provided management and exempt employees with the same insurance coverage and premium contribution amounts that it provided to the Union's bargaining unit employees.

4. By the end of the 2004-07 collective bargaining agreement, Union-represented employees paid up to $700 per month for family insurance coverage under the County plan. Since some Union bargaining unit employees earned approximately $2,000 per month, a number of employees could no longer afford to insure their families through the County plan. As a result, several bargaining unit employees individually purchased family insurance plans through private insurance companies. These plans provided better coverage and cost less than the County's insurance plan.

2007 Successor Bargaining

5. The parties began bargaining for a successor agreement in late January 2007. AFSCME legal counsel Jason Weyand was the spokesperson for the Union's bargaining team, which also included employees Josh Paullus, Glenna Rionn, Tim McElrath, and Jim Dannen. County Commissioner William Hansell was the spokesperson for the County's bargaining team, which also included Commissioner Larry

Givens, County Administrator Jim Barrows, Collette Blakely, and Human Resources Director Connie Caplinger.[1] The parties had a collaborative relationship and had worked well together in the past to resolve issues.

6. The parties agreed to written ground rules on January 26, 2007. Under the ground rules, the parties agreed that "[d]uring the open negotiating meetings, the County shall record the meetings and shall make the recordings available for both parties as needed."

7. The primary issue for the Union during bargaining was health insurance benefits. On January 30, 2007, the Union proposed that the County pay 100 percent of the cost of employee-only insurance coverage, 95 percent of the cost of employee-plus-child coverage, 85 percent of the cost of employee-plus-spouse coverage, and 80 percent of the cost of full family coverage. The Union also proposed that the County make a $500 annual contribution to each employee's health reimbursement account (HRA).[2]

8. The County's initial proposal, dated January 31, 2007, was to maintain the existing "insurance cap" arrangement, which included five percent annual increases in the amount of the cap during the three-year contract.

9. During the bargaining session on February 20, 2007, the parties extensively discussed health insurance and the cost to insure employees' families and spouses. Union bargaining team members Paullus and McElrath explained that they obtained family insurance coverage through a private insurance company that was better and less expensive than the County plan. Union bargaining team members also raised concerns about the County's practice of procuring insurance through a bid process. The parties agreed it would be productive to explore options to the current County insurance plan, such as County self-insurance, a health savings account (HSA)[3], and providing employees with money to purchase their own insurance.

10. On February 22, 2007, Commissioner Hansell presented the County's proposal for Section 17.2. The proposal provided in part:

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[1]Caplinger also held the positions of executive director to the Board of Commissioners and Health and Human Services Director.

[2]An HRA is an account to which the employer can make pre-tax contributions for employees, who may then spend those contributions on out-of-pocket medical expenses.

[3]An HSA is an account to which an employee can make pre-tax contributions, which they are entitled to use to cover out-of-pocket medical expenses.

"In order to provide for adequate medical benefits without further increases in cost to the County, the County and the Union agree that:

"(A) Effective July 1, ~~2004, Insurance Cap will increase to five hundred thirty-one and fifty-two cents ($531.52) for this first year.~~ 2007, Insurance cap will increase to $633.98 for this first year.
"The County agrees to reopen on Article 17 in one year.
"~~B) Effective July1, 20058, [sic], Insurance cap will increase five percent (5%).~~
"~~(C) Effective July 1, 20069, Insurance cap will increase five percent (5%).~~" (Strikeover in original.)[4]

Hansell explained that the increased cap would place the Union's bargaining unit employees slightly above the employees in the bargaining unit at the Sheriff's Office for the current year. Hansell then explained that the County was proposing:

"Hansell * * * a reopener next year and give us a year we want to form a working crew to see you know with you folks

"Weyand: Um

"Hansell: because we were talking about maybe there is some alternatives out there, different ways to do it, that gives us some time we bumped the base that's a cost to us of about $28,000 and then see if there is anything out there that different ways to look at it we're real serious about working together trying to come up with some alternatives."[5]

11. After some discussion on other issues, Hansell stated:

"A couple of general comments and I'm okay with this but while thinking about it if you talk tonight um I want you to know our intent to really work with our employees and the Union on insurance. One of the things that was pointed out that I wanted to make sure was on the table as well when your dealing with three bargaining units there is that dynamic that maybe we can't come to some agreement but it's a little more awkward for

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[4]The language stricken out is from the parties' prior contract which the County proposed to remove.

[5]All of the recordings were apparently transcribed in an unedited word-for-word format. We quote the transcripts verbatim and have not attempted to correct spelling, grammar or sytax errors.

us or it may affect our rights if all three of us don't end up agreeing. See what I mean? We may get a better deal but it's we end up paying more premiums because we don't have enough people . . . Do you see what I'm getting at?"

Union Spokesperson Weyand responded that he understood what Hansell was saying and stated that "[w]ell, yeah I think if we go with this process of working on it over the next year obviously that doesn't mean we are going to agree on anything it just means we're going to work our butts off to try and do it."

12. The Union met with its bargaining unit on the evening of February 22. At the parties' bargaining session on February 23, Weyand told the County that bargaining unit members were not willing to continue the "insurance cap" for another year, but that "there was some interest in the one year reopener to explore health insurance options. They realize that there is some serious problems and maybe we can find some creative solutions. So they did give us the go ahead to kinda of agree to one year reopener on that."

The Union then presented its proposal for Article 17.2. The proposal would require the County to pay the following insurance premium costs:

100 percent for employee-only coverage;
95 percent for employee-plus-child/children coverage;
85 percent for employee-plus-spouse coverage;
80 percent of full family coverage.

The Union proposal did not include the language concerning a reopener after one year proposed by the County on February 22. Instead, the Union proposed to add the following new paragraph at the end of Section 17.2:

> "The Union and the County shall work together to explore options regarding alternatives to improve the quality and cost of County health care benefits. This Article shall be reopened by the parties on July 31, 2008, to allow for bargaining solely on the issue of health care benefits."[6]

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[6]The County presented into evidence another Union proposal dated February 23 which provided that the parties would use the Public Employee Collective Bargaining Act (PECBA) expedited bargaining process and interest arbitration if the reopener bargaining was unsuccessful. It is unclear from the evidence if and when this proposal was discussed. However, resolution of this matter is not critical to our decision.

The Union also notified the County that its members were determined to get something better than "the usual agreement," and had agreed to establish an internal strike fund in preparation for achieving that goal. After additional discussions, the County described the Union's proposal as "unsustainable, unreasonable and undoable" and stated that there may not be a reason to meet further since it appeared they were getting to impasse. The parties then discussed their different perspectives on the County's budget and finally decided to reconvene in March.

13. During the bargaining session on March 13, 2007, Weyand notified the County that if it agreed to a reopener, employees would need to have the right to strike if they reached impasse. Weyand also told the County that he had conducted a survey and determined that the County had the worst insurance of all 90 or more AFSCME locals. The parties did not exchange proposals on insurance at this meeting.

14. At a bargaining session on April 11, 2007, the County presented a new proposal to pay 85 percent of the cost of health insurance premiums, with employees paying the remaining 15 percent. The County explained that this was a significant shift in how it had previously provided health-care contributions, and its proposal would significantly increase the County's health insurance costs. The County proposed to retain the following sentence from its February 22 proposal: "The County agrees to reopen on Article 17 in one year." In addition, the County accepted the Union's February 23 proposal for the last paragraph of section 17.2 which specified that the parties would work together "to explore options regarding alternatives to improve the quality and cost of County health care benefits" and would reopen Article 17 on July 31, 2008, to bargain solely about health care benefits.

15. The parties continued their negotiations at an April 17, 2007 bargaining session. They exchanged a number of proposals at this meeting. At one point, the Union proposed that the County pay either 90 percent of the health insurance premium cost for all employees or 85 percent of the cost for all employees, as long as employees electing employee-only coverage paid no more than $50 per month.[7] The Union also proposed the following language for the last paragraph of Article 17.2:

> "The Union and the County shall work together to explore options regarding alternatives to improve the quality and cost of County health care benefits. This Article shall be reopened by the parties on July 31, 2008, to allow for bargaining solely on the issue of health care benefits. If impasse is reached on this issue, the employees shall have the right to engage in any lawful actions, including but not limited to a strike, despite any contract language to the contrary in Article 6."

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[7]Although this proposal is dated April 11, the transcript of the April 17 meeting shows that it was presented at the April 17 bargaining session.

The Union replaced its prior proposal regarding HRAs in Section 17.3 with the following sentence: "[t]he County agrees to discuss the creation of a Health Reimbursement Account with the Union during the next year." Weyand explained that

> "we added a small sentence about agreeing to discuss a health reimbursement over the next year. Something a lot of our members were excited about having potentially in this contract, so we just want to have something in the agreement that we'll talk about it. Not formal negotiations necessarily but in the process of a reopener. Our efforts to seek alternatives and that would be one of our considerations."

16. Also on April 17, the County presented a counter proposal to pay either 85 percent of the cost of all levels of insurance coverage or 100 percent of the cost of employee-only coverage and 75 percent of the cost of all other levels of insurance.[8] While discussing the County's contribution to dental insurance under this proposal, Hansell stated: "Let's do this, we would include it in the first year but it would be up for negotiations _____ That would work because we don't know what..Josh you raised a good question_____bogged down on the details."[9]

17. At their April 17 meeting, the parties again discussed the Union's concerns about the County's process for securing insurance bids. After Hansell told the Union that insurance was a "[h]uge bite out for the County budget and I sincerely wish we could afford to give employees much much more," Paullus responded

> "[m]any of the members are, if I may, very anxious to start working to get a better insurance plan. Several of them have come to me personally saying that they want to start that process now as far as getting better insurance because there's several of them that said that they have talked to their members that do sell insurance plans that never been approached by the County so they could probably do better that what we currently have."

The County explained that it did not contact individual insurers during the bid process but advertised for bids through a consortium of insurance agents. Paullus responded that the insurer with whom he talked had never been solicited for a bid. The conversation continued as follows:

> "Weyand: I guess what we're saying is that within the next year we're working on potential solutions. One of those we would like

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[8]This proposal, which was dated April 11, was not presented until April 17.

[9]Although it is not stated in the transcript of the meeting, from its context we assume that "_____" is used to indicate that the recording is inaudible.

to explore is maybe is there a more effective way to require bids. Is there more effective ways that approach insurance companies directly, you know, think outside the box, that the status quo just been kinda creeping up and I don't think any of us are closing any options.

"Paullus: Everybody recognizes the same stress.

"Barrow: Yeh. I think it's of our mutual interest keeping in mind that everybody at this table themselves has a stake in that process. We all have insurance and the same issues that face the members. So I mean if we could get better insurance for a cheaper price that's wonderful."

18. At some point during the April 17 meeting, Barrow mentioned that it was time for the insurance committee to meet, that the County was thinking about formalizing the process with clearer representation, and that the committee had difficulty getting people to attend. Weyand responded that the Union wanted to be part of the insurance committee process.

19. At another point during the April 17 bargaining session, when Weyand was presenting a Union counter proposal, he stated:

"Weyand: Everything else I believe other than 17.3 we kept the language in concerning discussing creation of a health universal account. You didn't respond to that specifically. Obviously it's not just means we'll have discussions about it when we're talking about how to fix things. Is there anything else that was different. 17.1,[10] Current Language instead of the term proposal and that was your looking to change comparable to similar. When we're going to renegotiate the insurance package as a whole in one year. I don't see any reason to make that change as of yet. If we over the next year are discussing insurance and bargaining. We come to better understanding exactly where you trying to go with that."

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[10]Article 17.1, Health and Welfare, in the parties' 2004-2007 collective bargaining agreement provided that the County would "continue its present or comparable medical and hospital insurance program for the term of this Agreement, for all employees who are covered by this Agreement, and who qualify under the terms of such programs." In addition, the article required the County to make dental insurance available to qualified employees, provided that a sufficient number of employees wanted this insurance. The article also specified that if two members of the same family were bargaining unit members, the County would not be obligated to provide duplicate contributions or benefits to the same family unit.

"Barrow: Maybe we can talk about that for now I really don't think any substantial changes I hope are coming _____

"Weyand: Other than that I think we're in agreement. We've given up our differentials and we pretty much agreed with every other aspect of your package other than those few changes. Caucus?"

20. Toward the end of the April 17 bargaining session, the County presented a counter proposal to pay 100 percent of the cost of employee-only coverage and 75 percent of the cost of all other levels of insurance. The County's counter proposal included the following final paragraph for Section 17.2:

> "The Union and the County shall work together to explore options regarding alternatives to improve the quality and cost of County health care benefits. This Article shall be reopened by the parties <u>in adequate time</u> before July 31, 2008, to allow for bargaining solely on the issue of health care benefits. The County agrees to discuss the creation of a Health Reimbursement Account with the Union during the next year. If impasse is reached on this issue, the employees shall have the right to engage in any lawful actions, including but not limited to a strike, despite any contract language to the contrary in Article 6." (Emphasis in original.)

21. In response to this County proposal, the Union proposed that the County pay 80 percent of the cost of all health insurance premiums. However, the County maintained its last proposal and the parties were unable to reach agreement on the insurance premium sharing amount. At the end of the April 17 meeting, the parties agreed to request mediation.

22. After the April 17 bargaining session, the Union decided to present the County's last proposal to its bargaining members for a vote without a recommendation. Bargaining members voted in favor of the County's last proposal, which was then incorporated into the parties' 2007-10 collective bargaining agreement. Article 17, Section 17.2 of that agreement, which was executed on June 26, 2007, provides:

> "In order to provide for adequate medical benefits without further increases in cost to the County, the County and the Union agree that:
>
> "Effective July 1, 2007, the County will contribute the following percentage of insurance premiums:
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> 75% for coverage of the total premiums. The employee shall pay 25%. Employees who elect employee only coverage shall remain at 100%.

"The County agrees to reopen on Article 17 in one year.

"* * * * *

"The Union and the County shall work together to explore options regarding alternatives to improve the quality and cost of county health care benefits. This Article shall be reopened by the parties in adequate time before July 31, 2008, to allow for bargaining solely on the issue of health care benefits. The County agrees to discuss the creation of a Health Reimbursement Account with the Union during the next year. If impasse is reached on this issue, the employees shall have the right to engage in any lawful actions, including but not limited to a strike, despite any contract language to the contrary in Article 6."

Interim Events

23. Under the new premium sharing arrangement in the 2007-10 agreement, bargaining unit employees paid $367.37 for full family insurance during the 2007 insurance year. This was $486.79 less than employees would have paid under the "insurance cap" arrangement in the 2004-2007 collective bargaining agreement. The County projected that if the parties maintained the current benefits, employees would pay $532.75 less in 2008 and $633.70 less in 2009 than they would have paid under the "insurance cap" arrangement in the 2004-2007 contract.

24. Between June 2007 and February 2008, Weyand talked with Barrow several times about the collaborative process provided for in the contract. The insurance committee, which included County and Union representatives, met to review insurance plan options. In addition, Union president Teresa Pearson contacted several insurance companies regarding insurance plans that might be options for the County. At the County's invitation, Weyand attended a June 19, 2007 meeting about HRAs with the County's insurance representative. Weyand also attended a meeting with the County about VEBAs, another type of pre-tax employer contribution account which the County was discussing in its negotiations with the Umatilla County Law Enforcement Association (UCLEA).

25. On July 31, 2007, the Union filed a grievance with the County on behalf of some bargaining unit employees who lost compensation for on-call duties. The County granted the Union's grievance, but subsequently removed the on-call duties from those employees. On January 16, 2008, the Union filed an unfair labor practice complaint alleging that the County had violated ORS 243.672(1)(a), (c), and (e) by: threatening to remove the on-call duties because of the Union grievance and subsequently removing those duties; threatening to lay-off three employees

if the Union sought reclassification and additional compensation for the employees to whom the on-call duties had been reassigned; and failing to bargain over the removal and reassignment of the on-call duties. One of the allegations in the complaint was based in part on a conversation that Weyand had with a County manager when both were working out at a local gym.[11]

26. In a meeting with the Commissioners after the unfair labor practice complaint was filed, Commissioner Hansel told Weyand that he felt that Weyand had broken a confidence by relying on the informal discussion with the County manager as a basis for the complaint. Hansell asked how they could trust that anything they said off-the-record would be held in confidence. Weyand responded that the manager made threats which he could not ignore, and if what was said was to the advantage of the employees or Union, then it would not be held in confidence. Hansell told Weyand that he felt they could no longer have informal off-the-record discussions, and if they were going to meet in the future, it would have to be done formally, with others present. After this meeting, the County's relationship with Weyand began to sour and became more formal. Weyand believed that the County had developed an "us" versus "them" mentality and that the parties subsequently were less able to work together effectively.

27. On January 17, 2007, this Board certified the UCLEA as the exclusive representative of employees in the County Sheriff's Office. These employees had previously been represented by the Service Employees International Union (SEIU).

28. After the certification, the UCLEA and the County began negotiating a collective bargaining agreement. During bargaining, the County conducted an extensive study of insurance benefits and compensation for comparable positions in other law enforcement agencies. The County determined it was paying UCLEA bargaining unit employees significantly less than law enforcement employees in other agencies. As a result, the County decided to offer UCLEA bargaining unit members substantial increases in salaries and benefits. The County believed that if it did not provide these increases, an interest arbitrator would do so in an award.

29. On January 2008, the County and the UCLEA entered into a collective bargaining agreement, effective July 1, 2007 through June 30, 2010, which provided that the County would pay 90 percent of the full cost of employee health insurance, contribute $42.00 per month per employee to an HRA, make a one-time $500

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[11]On April 30, 2009, this Board issued its order on the complaint, holding that the County had violated ORS 243.672(1)(a) when it threatened to remove the on-call duties, removed the on-call duties, and threatened to lay off employees if the Union sought their reclassification. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No UP-2-08, 23 PECBR 108 (2009).

contribution to each employee's HRA, and pay salary increases of three percent effective July 1 and two percent effective January 1 of each year of the three-year contract. The cost of the 2007-10 UCLEA Contract to the County was approximately $2 million.

2008 Reopener Bargaining

30. On February 22, 2008, Weyand sent an e-mail to County Administrator Barrow indicating that the Union had selected its members for the insurance reopener bargaining committee and wanted to begin meeting as soon as possible.

31. On February 25, 2008, Barrow sent the following e-mail to Weyand: "Thanks Jason. I'll check with the Chairman [Hansell]. Unfortunately he will be in D.C. for about a week and has an State Weed Board mtg on the return, so it might be a couple of weeks." Commissioner Hansell has acted as the County's lead negotiator during bargaining since 1983 or 1984, when the association representing the employees in the County Sheriff's office asked that the Commissioners bargain directly with the unions.

32. The parties held their first bargaining session pursuant to the reopener on March 24, 2008. At the beginning of the meeting, Hansell told the Union that the insurance company projected an 18 percent increase in insurance rates for 2008. Weyand discussed the UCLEA Contract and the insurance rate expectations. The parties discussed the County's current bid process. Weyand asked if the County had explored ways of containing costs, and the County indicated that the insurance committee was looking into this. Neither party presented a proposal during this meeting. At the end of the meeting, Weyand told the County that the Union wanted to meet with insurance representatives in late April before it developed its proposal and suggested that the parties meet for bargaining in early May.

33. During March 2008, AFSCME organized employees in the County's District Attorney Office for the purposes of collective bargaining. In late March or early April, Weyand requested that the County grant voluntary recognition to a unit of deputy district attorneys. On April 4, Barrow told Weyand that the County would grant voluntary recognition. However, on April 9, Barrow told Weyand that he was mistaken, and that the Commissioners would consider the request for voluntary recognition at their April 15 meeting. The Commissioners ultimately decided not to grant voluntary recognition. On April 23, AFSCME filed a petition for certification without an election for the County deputy district attorney unit, to which the County did not object. On May 13, this Board certified AFSCME as the exclusive representative of this unit.

34. On May 1, 2008, the Union held a forum for County Commissioner candidates. Only Commissioner Dennis Doherty and candidate Glen Youngman

attended the forum. After the forum, the Union issued a press release endorsing Youngman for County Commissioner and the Union's president wrote an article for a newspaper about the endorsement.

35. Sometime prior to June 5, 2008, the insurance committee met to review the insurance bids secured by the County's insurance broker. The committee reviewed a number of different insurance options presented by Lifewise, Pacific Source, and Blue Cross insurance companies. Union representatives attended the meeting.

36. On June 5, 2008, the parties met for their second bargaining session. They chose this date because they expected to have insurance bids by that date. At the beginning of the meeting, Weyand presented what he described as the "Sheriff's Package Plus."[12] The Union proposed that the County pay 90 percent of all insurance premium costs, increase employee life insurance from $25,000 to $50,000, contribute $45.00 per month per employee to an HRA, reimburse employees for up to $100 annually for vision care expenses not covered by health insurance, provide life flight insurance, and formalize the current wellness committee. Weyand explained that the Union included some items not in the UCLEA Contract because Union bargaining unit members were "envious" of the Sheriff's employees' wage package and insurance benefits and distressed because an employee had recently died and left his family with limited life insurance benefits. Weyand referred to the discussions at the insurance committee regarding the Union's proposal on vision insurance and the wellness committee.

37. County bargaining representatives were surprised by the Union's proposal. After Weyand's presentation, Hansell said that he thought that part of the reopener was the Union's agreement to analyze a variety of insurance options and to work with the County in an attempt to reduce insurance costs. Hansell asked whether the Union had anything to offer in that regard. Weyand responded that "[w]e had explored options like we've contacted other insurance companies and tried to explore ways of making it cheaper to procure insurance through different companies, and as most folks on that side of the table predicted, the process we have got now is about as good as it is going to get, so we were interested in exploring that and we tried and clinically it came up that Lifewise and now, it looks like Pacific Source and Blue Cross put in some more competitive bids. This is probably the way to go, so . . .".

38. The County representatives explained that it was their understanding that in reopener negotiations, the parties did not intend to add benefits beyond those

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[12]Exhibit R-19, the transcript of the June 5 bargaining session, refers to the speakers not by name, but by Male #1, Male #2, etc. While it is possible to identify who is speaking to some extent from the testimony at the hearing and from the content of some of the statements, not all comments can be clearly identified. Therefore, we do not always identify which bargaining team member made what statement.

currently provided in Article 17. According to the County, the parties negotiated the reopener so the Union could bargain solely about the health care benefits provided in Article 17 and the HRA. Weyand disagreed with the County's narrow interpretation and stated that the Union's position was "that vision, wellness, and Life Flight insurance, that sort of thing is all part of health care coverage * * *." The County responded that

> "[t]he discussion as I recall when we meeting is that we want to have an opportunity to look at the health insurance and that, uh, I think a couple of folks were saying we could get it cheaper, and I did remark that we wanted to make that a possibility, and okay, let's do it. We'll do it for a year and you guys will reopen that and see what we can do and if we can do it. But it was not, you know, we were trying to be very specific within the parameters that we have. That's all."

The Union said that it was not their understanding that the reopener was so narrow and asked if the County's position would "be reflected in the counter offer or just stay."

39. In a caucus at the June 5 bargaining session, the County projected the cost of the Union's proposal; it then shared its cost projections with the Union. The County stated that it had determined that the total cost of the Union's proposal would be $124,000 in addition to $78,000 the County was already obligated to pay as a result of a seven percent increase in the cost of current insurance premiums. The County said that it did not have money to pay for the Union's proposal and that it was already laying off seven and one-half employees and making other cuts. Weyand disagreed with the County's cost projections and reminded the County that the amount budgeted for health insurance was higher than the actual cost. Weyand also stated that over the past six years, the County had over-budgeted expenditures by 10 percent and under-budgeted revenues by five percent. The County representatives responded that although the Union was focused on the 123 employees it represented, the County also had to look at other employee costs, including the cost of the new UCLEA Contract and the cost of the seven percent insurance premium increase for the exempt employees.

40. Weyand then asked if the County had a counter proposal. The County representatives stated that "[c]ounter is current." At that point, the Union asked if this meant the County was not even going to offer the Union the benefits provided in the UCLEA Contract. The County responded that it was not. The Union and County representatives then had a somewhat contentious discussion about the differences between the benefits in the UCLEA contract and those in the Union contract. The Union explained that its bargaining unit members did not feel valued because the County was treating UCLEA employees better. The County expressed frustration that the Union was discounting the substantial increases for Union bargaining unit members to which it had agreed in the prior year. The County stated that under the Union's analysis, the County must value Union bargaining unit members as much as the exempt

employees and the Commissioners themselves because they all received the same benefits. The County also explained that it agreed to the economic package in the UCLEA contract because those negotiations could have ended in binding arbitration. If they had, the County believed an arbitrator would probably have awarded UCLEA bargaining unit members significant increases in wages and benefits to make them more comparable to those provided by other law enforcement agencies.

The Union acknowledged that the County had given Union bargaining unit members increases last year, but pointed out that the County then gave the UCLEA employees more. The Union said its bargaining unit members were upset because they felt they were being laid off to pay for the UCLEA Contract. The Union asserted that what was good for the Sheriff's Department employees should be good for the rest of the County. The County asked if the Union wanted another 20 employees laid off to pay for the Union's proposal and the Union again disagreed with the County's budget numbers. At the end of the session, the parties joked about the value of the County Commissioners and exempt employees, since they too were not getting the increased benefits in the UCLEA Contract. The Union then said it would take the County's position—to retain the *status quo*—to its members. The County suggested that the Union tell its members that by maintaining the *status quo,* the County would incur $78,000 in additional costs due to the premium increase; if insurance costs did not increase as much as projected, it might save some jobs. At the end of the meeting, the County thanked the Union for coming.

41. After the meeting, Weyand sent an e-mail to Barrow which stated:

"I wanted to be sure that I understood the County's position concerning the ongoing insurance negotiations. I believe you or Commissioner Hansell stated that the County's position is that is [*sic*] does not have to bargain over the Union's proposals concerning life flight insurance, vision reimbursement, and the Health Reimbursement Arrangement, and that these items are not open for negotiation. Please let me know whether this is an accurate recollection of today's meeting."

42. On June 5, Barrow responded to Weyand:

"I am very sorry if you came away from today's bargaining session with those impressions. Such was and is not the County's position. For one thing, the discussion of HRAs is expressly covered in Article 17.2. Further, I think you misinterpreted Commissioner Hansell's point regarding the various elements you sought to add to or expand in our existing insurance coverage. The Chairman stated that his understanding of the intent of the re-opener for Article 17 was clear in last year's bargaining. It was to allow for the Union to seek less costly alternatives to the then present coverages

and providers. That would have been to the mutual benefit of the County as well as its employees who share in those costs. He noted and you agreed that this did not happen.

"Rather, it appeared that instead of offering less costly alternatives, the Union basically was seeking a sweetened 'me-too' version of the Umatilla County Law Enforcement Association's health coverage article.

"If you will recall, we did indeed discuss each of the offered proposals, including the HRA. We attached cost estimates to each one and evaluated them with you in light of the County's budget realities and desire to avoid further, or possibly even to reverse some of the already planned lay-offs [*sic*] the present budget for FY [fiscal year] 2008-2009 compels.

"The fact that during the discussions we did not accept your proposals was not an indication of unwillingness to bargain. We did bargain those and other proposals and remain willing to continue to do so. As I recall, your proposal before adjourning this session was to wait until after the Budget adoption and then you would evaluate what you felt could be 'excess' or 'available' dollars to further fund some of these proposals. That ball is presently in your court." (Emphasis in original.)

43. Weyand responded that same day to Barrow and told him that he would

"speak to my members about the County's proposal of status quo, and in the meantime do some research into the budget situation. I suspect we will make a counter offer in the interim to reflect some of the cost concerns you raised today. We should set a future date for a second session soon, as we should have this resolved by the end of the month. Let me know some dates your team is available to meet."

44. Barrow responded by e-mail to Weyand and said that since he was scheduled to go on medical leave, he would ask Caplinger and Blakely to schedule a bargaining date. Barrow sent a copy of the e-mail to Caplinger and Blakely. Neither Caplinger or Blakely contacted Weyand about scheduling a meeting. On June 17, Weyand e-mailed Caplinger and Blakely asking whether the parties could meet the following week. Caplinger did not respond to Weyand's e-mail because she was out on medical leave.

45. At an insurance committee meeting in mid-June 2008, the committee identified a bid for an insurance plan that cost less than the current County plan, but had similar benefits. The bid required that the County notify the insurer within two

weeks if the County selected its plan. The committee recommended that its representatives attempt to seek approval of the new insurance plan from their membership. The Union members were unable to vote on the recommendation within the specified time line due to a notice requirement in its bylaws. As a result, the County did not accept the new insurance plan and defaulted to the existing plan.

46. On July 2, Barrow e-mailed Caplinger, with a copy to Weyand, asking what date had been selected for bargaining. After an exchange of e-mails between Caplinger and Weyand, the parties scheduled July 8 for the next bargaining session.

47. The parties held their third bargaining session on July 8. The meeting was scheduled to begin at 9:00 a.m, but started at 9:10 a.m. Barrow, who was still on medical leave, returned to work for the sole purpose of attending the meeting. Commissioner Hansell arrived for the meeting at 9:20 a.m. because he had been speaking on a radio program. Weyand presented the Union's second proposal, in which it eliminated its vision reimbursement proposal and reduced the amount of the proposed HRA contribution. The parties again discussed the costs associated with the Union's proposal and reviewed the differences in their cost estimates. The Union pointed out that its proposal cost less than the County's agreement with UCLEA.

During the County's caucus, Hansell decided he would need to meet with the other Commissioners. After the caucus, Hansell stated:

> "Here is the situation that I'm in right now. Uh, my two colleagues are on vacation. And we won't be back for about two weeks. And anything that we, that I put on the table, I mean as far as which is going to cost the county more, I've got to run it by them a little bit before I can make proposal [*sic*]."

Hansell then proposed to adjourn the bargaining session to "let me bounce some things off of our colleagues when everybody gets back" on the week of July 20th. Hansell stated that "we're gonna research some of the costs and things like that." The parties set the next bargaining session for July 24.

48. On July 24, the County requested that the Union reschedule the session set for that day to allow the County additional time to respond. The parties rescheduled the meeting for July 30.

49. At the beginning of the July 30 meeting, Weyand asked for the County's counter proposal. Hansell said they were still working on the County's response and asked for a caucus. After approximately 45 minutes, the County returned and Hansell stated that the purpose of the reopener was to improve quality and cost, that the Union proposal involved additional costs, that an HRA only works with a cost offset, and that the Union had proposed no cost offset. The parties then had the following discussion:

"Hansell We will increase our payment of premium by the 7% in our share.

"Weyand Your proposal is only status quo. No HRA.

"Hansell No, we will increase our contribution by the 7% increase."

Weyand responded that based on the County's delay and lack of authority in the prior meeting, he believed the County was bargaining in bad faith. After another caucus, Weyand suggested that the parties go to mediation, to which the County agreed.

50. On July 31, 2008, Weyand and Barrow each sent this Board a request for mediation.

51. At the mediation session on September 18, Hansell arrived 10 minutes late. The parties initially met together with the mediator. Weyand explained the Union's last proposal. Hansell and Barrow said that they understood that the purpose of the reopener was to save money and improve coverage, and that the County had made a significant investment in health insurance by moving from the "insurance cap" to the percentage premium share during previous bargaining. Hansell and Barrow explained that the County had paid the increase in premium costs, and that the focus of the reopener was on cost savings. Hansell stated that because the Union failed to find a less expensive insurance plan, the County saw no need for the reopener.

The parties then met in separate rooms while the mediator engaged in shuttle negotiations. When the mediator met with the County, he asked if any movement was possible. The County replied that they felt they had already moved by agreeing to pay a seven percent premium increase and that the Union never voted on the cheaper plan the insurance committee found. Hansell then told the mediator that any new movement would have to come out of the existing package. The mediator returned to the Union and told them that the County was not willing to add dollars but that it might move the same dollars around. The Union then presented a proposal to the County through the mediator in which it dropped its request for life flight insurance. The County did not respond with a formal proposal to the Union and the mediation session ended.

52. In approximately October 2008, the County and AFSCME reached agreement on the terms of the first collective bargaining contract for the deputy district attorneys' bargaining unit.

53. During 2008, the County implemented layoffs and did not fill some vacant positions. As of June 30, 2009, the County had laid off 17 people, closed its youth detention facility, and closed one of three public health offices, while reducing hours in the other two.

54. In preparation for the hearing in this matter, Weyand requested the recordings of the parties' 2007 negotiation sessions. In responding to Weyand's request, the County notified him that it was unable to provide him with the recording of the meeting on February 20, 2007, because they could not find the recording and believed it had been taped over.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The County did not violate ORS 243.672(1)(e) by failing to bargain in good faith regarding a collective bargaining agreement health insurance reopener from February through August 2008.

DISCUSSION

When the Union and County negotiated a successor to their 2004-2007 collective bargaining agreement, health care benefits were a major concern for both parties. After extensive discussions about this issue, the County and Union agreed to language in their 2007-2010 agreement that eliminated the former "insurance cap" arrangement which obligated the County to pay a fixed dollar amount toward the cost of employees' health insurance benefits. The provisions of the new contract required that the County pay 100 percent of the premium cost for employee-only health insurance and 75 percent of the premium cost for all other health insurance. In addition, the Union and County pledged "to work together to explore options regarding alternatives to improve the quality and cost of county health care benefits." The parties agreed to reopen Article 17.2, the insurance article, "in adequate time before July 31, 2008 to allow for bargaining solely on the issue of health care benefits."

Under this reopener provision, the County and Union began negotiating about health care benefits in February 2008. After their efforts to reach agreement at the table were unsuccessful, they requested mediation on July 31, 2008. A September 18 mediation session ended without an agreement between the parties, however.

The Union alleges that the County violated ORS 243.672(1)(e) by engaging in bad faith surface bargaining about health insurance benefits under the reopener provisions of the collective bargaining agreement. An employer engages in unlawful surface bargaining under subsection (1)(e) if the totality of its conduct during

negotiations demonstrates an unwillingness to reach agreement.[13] *Hood River Employees Local Union No. 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94, 16 PECBR 433 (1996), *AWOP*, 146 Or App 777, 932 P2d 1216 (1997); *City of Portland v. Portland Police Commanding Officers Association*, Case Nos. UP-19/26-90, 12 PECBR 424 (1990). In analyzing a surface bargaining claim, we consider "whether dilatory tactics were used, the content of the party's proposals, the behavior of a party's negotiator, the nature and number of concessions made, whether a party failed to explain its bargaining positions, and the course of negotiations." *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 584 (1996); *School Employees Local Union 140, SEIU, AFL-CIO, CLE v. School District No. 1, Multnomah County*, Case No. UP-44-02, 20 PECBR 420, 431 (2003). The Union asserts that the County demonstrated its unwillingness to reach agreement during health insurance reopener negotiations by making unreasonably harsh proposals, refusing to make concessions, using dilatory tactics, and engaging in egregious behavior. We consider each of these indicators of bad faith bargaining in turn.

Content of County's Proposal

A bargaining proposal which is unduly harsh or unreasonable can be evidence of bad faith bargaining. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8198 (1985). To determine whether a proposal is so harsh as to indicate bad faith bargaining, we analyze proposals in the context of the total bargaining circumstances. *Portland Association of Teachers v. Portland School District No. 1J*, Case Nos. UP-35/36-94, 15 PECBR 692, (1995). An employer's regressive proposals may indicate "hard bargaining on difficult issues" rather than bad faith bargaining, if they are the result of financial problems. *Id.* at 716. *See also Assoc. of Oregon Corrections Employees v. DOC*, 213 Or App 648, 660, 164 P3d 291 (2007) (because of budget constraints, "the state's wage freeze proposals cannot be said to have been 'unduly harsh or unreasonable.'").

Here, the County never presented a written proposal in bargaining. It is clear from the parties' discussions, however, that the Union understood the County's proposal throughout reopener negotiations was to maintain the current contract language, which required it to pay 100% of the premium cost for employee-only health insurance coverage and 75% of the premium cost for all other coverage. Under this proposal, the

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[13]An employer may also violate subsection (1)(e) if its conduct during negotiations is so inimical to the bargaining process that it is a *per se* violation of its obligation to bargain in good faith. *Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 365, 378 (2009). The Union does not allege that the County engaged in *per se* bad faith bargaining.

County would pay the entire seven percent increase in 2008 insurance premiums for employees who chose employee-only coverage and a portion of the premium increase for all other employees.[14]

The County's proposal to maintain current contract provisions regarding payment of insurance premiums was neither unduly harsh nor unreasonable under the totality of circumstances. The County's financial difficulties justified its desire to limit cost increases in insurance benefits. Although the Union disagreed with the County's view of its budget situation, the evidence demonstrates that the County's concerns about a lack of funds were well-founded; in 2008, it laid off several employees and reduced programs. Nor did the County's proposal eliminate or "rollback" current benefits, a factor which may indicate bad faith bargaining. *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District,* Case No. UP-80-95 16 PECBR 559, 585 (1996), *recons* 16 PECBR 707 (1996). To the contrary, the County's proposal resulted in an increase in the amount of employee premium costs paid by the County.

Lack of Concessions

The Union contends that during the several months in which the parties bargained about health insurance, the County offered no concessions. Instead, the County stuck to its initial proposal: maintain current contract language. According to the Union, the County's failure to make any concessions demonstrates that the County had no intention of reaching an agreement.

ORS 243.650(4) provides that "[t]he obligation to meet and negotiate does not compel either party to agree to a proposal or require the making of a concession." We have, however, more fully defined the scope of an employer's statutory bargaining duty as follows:

> "Even though this Board, like the NLRB [National Labor Relations Board], '. . . cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his differences with the

[14]Although the County argued that it also proposed to pay the entire seven percent premium increase for the other levels of insurance coverage, we find no evidence of this proposal in the record. The County never presented any written proposal which included this position. In addition, the parties' discussions during the July 30 bargaining meeting do not clearly indicate that the County was now offering to pay the entire seven percent increase in premium costs. To the contrary, Hansell states at one point during the meeting that the County proposes to "increase our payment of premium by the 7% in our share." The County never offered to pay the entire amount of the increased premium costs for everyone.

> union . . .' if the bargaining duty prescribed by the PECBA and the NLRA [National Labor Relations Act] ' . . . is to be read as imposing any substantial obligation at all.' " *McKenzie School District,* 8 PECBR at 8198. (Emphasis and ellipses in original; citation omitted.)

Here, the County never changed its proposal—current contract language—throughout reopener negotiations. The only movement the County offered came at the September 18 mediation session, when County negotiators indicated some willingness to consider changes in benefits that did not increase the County's expenses.

An employer's failure to make concessions during bargaining is, however, only one factor in the totality of circumstances that may indicate bad-faith bargaining. Although it is some evidence of bad faith, it is usually not enough to prove unlawful surface bargaining. *Oregon AFSCME Council 75, Local 2936 v. Coos County,* Case No. UP-15-04, 21 PECBR 360, 395 (2006). Because the County's failure to make concessions is the only evidence of surface bargaining, we do not conclude that the County bargained in bad faith.

The Union contends, however, that throughout reopener negotiations, the County continually insisted it had no duty to bargain about the Union's proposals because they involved no improvements or cost reductions in health care benefit plans. According to the Union, the County's repeated assertion that it had no duty to bargain crippled the parties' negotiations and demonstrated that the County was doing nothing more than paying "lip service" to its bargaining obligations under subsection (1)(e). We disagree.

In *Washington County Police Officers' Association v. Washington County,* Case No. UP-15-08, 23 PECBR 449 (2010), the county negotiated with the union about changes in working conditions that were mandatory subjects for negotiations. Throughout the bargaining, however, the county repeatedly insisted that it reserved the right to claim it had no duty to negotiate. We held that the employer's declaration was a statement of its legal position and not a refusal to bargain in good faith because the employer otherwise bargained in good faith with the union. *Id.* at 482. *See also Oregon School Employees Association, Eagle Point Chapter 30 v. Eagle Point School District No. 9,* Case No. C-253-80, 6 PECBR 4618 (1981) (a school district's statement that it was not required to bargain about the salary for a new position did not constitute a refusal to bargain, when the district willingly negotiated about compensation for the position).

Here, as in *Washington County* and *Eagle Point School District*, we conclude that the County's expression of its position—that it had no duty to bargain about the Union's proposals because they did not concern better, cheaper benefits—was a statement of its

legal position and did not indicate bad faith bargaining. In spite of its openly expressed opinions about the requirements of the reopener negotiations, the County participated in several bargaining sessions and seriously considered the Union's proposals. The County estimated the cost of the Union's proposals, assessed their potential impact on the County's financial situation, and explained its position in light of this information. When the Union pressed its proposals at the parties' July 8 meeting, County bargainers consulted with the Commissioners to determine if it had any flexibility in its position. At the parties' September 18 mediation session, the County indicated a willingness to consider alternative insurance packages that did not increase the County's overall costs. Because the County engaged in bargaining over the Union's proposal, its repeated assertions that it was not legally required to do so is not evidence of bad faith.

Dilatory tactics

The Union argues that the County engaged in dilatory tactics by delaying and avoiding bargaining with the Union. In support of its contention, the Union cites the following facts: 1) although the Union originally approached the County about reopener negotiations in February, 2008, the parties did not hold their first meeting until March 20, at which time no proposals were exchanged; 2) the parties did not have their second meeting until June 5, despite the Union's efforts to schedule an earlier meeting; 3) the parties did not hold their third meeting until July 8; and 4) the parties' last session before mediation, which was scheduled on July 24, was rescheduled to July 30 at the County's request. The Union contends that this behavior demonstrates that the County did not want to meet and had no serious intention of trying to reach an agreement.

A party's dilatory tactics that tend to "unreasonably impede negotiations" may indicate bad faith bargaining. *McKenzie School District,* 8 PECBR at 8197. *See also Hood River Education Association v. Hood River School District,* Case No. UP-47-94, 15 PECBR 603, 613-14 (1995). We consider all relevant circumstances in determining if delays in scheduling constitute bad faith:

> "In some cases, a delay of some length might not be unreasonable. In other circumstances, a delay of short duration might show bad faith. * * * It is not solely the length of delay that makes it unlawful but rather the nature of and reason for the delay. *Deliberate* delay—delay intended to frustrate or obstruct the orderly progression of the PECBA [Public Employee Collective Bargaining Act] process—is contrary to the intent of the PECBA." *Portland School District,* 15 PECBR at 726. (Emphasis in original.)

Here, the record is devoid of evidence that the County deliberately delayed scheduling bargaining sessions with an intent to frustrate the bargaining process. The County offered legitimate reasons for delaying or postponing bargaining sessions. The County postponed the first meeting so it could ensure that its chief spokesperson would be present. It is undisputed that Hansell has historically been a part of the County's

bargaining team and was a necessary team member. In addition, the Union failed to show that delaying the first meeting until March 20 unduly affected the bargaining process. The Union itself was unprepared to present its first bargaining proposal until it had the opportunity to meet with insurance representatives in late April.

Any delay in scheduling the June 5 meeting was not solely attributable to the County. Both parties wanted to postpone meeting until after the insurance committee met and the County received 2008 insurance bids, which were due in May. There is no evidence that once the County received these bids, it unduly delayed meeting with the Association.

After the June 5 meeting, the County failed to promptly respond to the Union's request to schedule the next meeting, resulting in a month's delay in the bargaining process. However, the failure was due to an unfortunate series of absences for medical reasons and County representatives' failure to communicate with each other during those absences. As soon as Barrow discovered that the County had neglected to respond to the Union's June 5 and June 17 requests for a meeting, he promptly offered dates and the next meeting was scheduled for July 8.

Nor did the scheduling and postponement of the parties' July meeting demonstrate any County intent to deliberately obstruct the process of negotiations. The County set the meeting for July 24 so that Hansell could first meet with the other Commissioners and determine their position on the Union's proposals for enhanced benefits. The Commissioners were on vacation and unavailable to meet promptly with Hansell. Hansell planned to ask the Commissioners to contemplate a change in their bargaining position, a task that understandably may have required more time than Hansell originally thought. Given these circumstances, Hansell's need for an additional week to meet with the Commissioners was reasonable. We do not find that this delay indicates bad faith bargaining.

Behavior of County Bargainers

The Union argues that the County bargaining representatives behaved egregiously.[15] The Union admits that the County bargaining team members were not rude or threatening, but contends they were "brusk and hostile" and that this was clearly different than the County representatives' behavior during the parties' last negotiations experience. The Union points to a number of events that occurred between the end of negotiations for the 2007-2010 agreement and the beginning of 2008 reopener negotiations as reasons for the change in the County's attitudes and behavior.

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[15]"Egregious" means "conspicuously bad" or "flagrant." *Klamath Falls Education Association/OEA/NEA v. Klamath Falls City Schools*, Case No. UP-27-07, 23 PECBR 257, 285 (2009).

In *McKenzie School District*, we explained that:

> "Professional negotiators employ various bargaining styles. Stridency, shouting and sarcasm are not uncommon in labor-management negotiations--from either side of the bargaining table. Emily Post-approved deportment is not a requirement of good faith bargaining, even though discourteous or otherwise-offensive behavior is not necessarily desirable." 8 PECBR at 8198.

There is no evidence here that the behavior of the County's bargaining team members was so offensive as to indicate bad faith bargaining. While the negotiations may not have been as collaborative or friendly as in the past, the circumstances during this bargaining were also very different. The parties clearly disagreed about the scope of the reopener bargaining. In addition, both parties recognized that the level of the County's trust in the Union representatives was diminished. Yet from the beginning of reopener negotiations, County representatives listened to the Union, considered the Union's proposals, and presented and explained their own bargaining position in a clear and consistent (though firm) manner. Although the County's behavior was different and less cordial than in the past, this change in attitude does not demonstrate bad faith bargaining.

Conclusion

Based on the totality of the County's conduct, we conclude that the County did not engage in bad faith bargaining in violation of ORS 243.672(1)(e). Because of our conclusion, it is unnecessary to consider the County's affirmative defense—that it had no obligation to bargain with the Union because the Union's proposals exceeded the scope of the reopener. We will dismiss the complaint.

Civil Penalty

The County asks that we impose a civil penalty on the Union under ORS 243.676(4)(b). That statutory provision authorizes us to award a civil penalty when we dismiss an unfair labor practice complaint "and the complaint was frivolously filed or filed with the intent to harass the other person, or both." The County contends that a civil penalty is appropriate because this complaint was either frivolously filed, or filed with an intent to harass the County for refusing to agree to the Union's proposals.

A pleading is frivolous only if every argument it asserts is one which a reasonable lawyer would know is not well-grounded in fact or supported by existing law or by a reasonable argument for extending the law. *Chemeketa Community College Classified Employees Association v. Chemeketa Community College*, Case No. UP-27-08, 23 PECBR 612

(2010) (citing *Northwest Education Association /OEA/NEA v. Northwest Regional Education Service District,* Case No. UP-23-06, 22 PECBR 247, 258 (2008)). The arguments asserted by the Union in this case are not frivolous. All were based on facts in the record and supported by existing case law.

Nor do we find that the Union's complaint was filed with an intent to harass the County. "Harass" means to "torment (someone) by subjecting them to constant interference or intimidation." *On-Line Dictionary,* Oxford University Press. The County offered no evidence that the Union filed this complaint to intimidate the County or punish it for taking a bargaining position the Union found unacceptable. Accordingly, we will not order the Union to pay a civil penalty to the County.

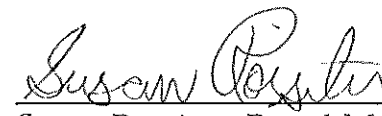
ORDER

The complaint is dismissed.

DATED this 22 day of September, 2010.

Paul B. Gamson, Chair

Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.